No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

v.

RADCLIFF MATERIALS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE THE DUPLAN CORPORATION AND OTHERS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

PAGE

Interests of Amici Curiae 2

Summary of Argument 4

ARGUMENT—

I. Claim Reduction Is Not An Issue Before the Court and Should Not Be Decided In This Case 5

II. Claim Reduction Overturns Long Established Rules of Antitrust Law 8

A. Claim Reduction Is Prohibited by Section 4 of the Clayton Act and, If Adopted, Would Effectively Amend It 8

B. Claim Reduction Undermines the Concept of Joint and Several Liability 10

III. Considerations of Antitrust Policy Do Not Support Adoption of a Rule of Claim Reduction 12

A. The Coercive Effect of Large Multi-Defendant Antitrust Actions Does Not Require Adoption of a Rule of Claim Reduction 12

B. Claim Reduction Is Unfair 14

C. Claim Reduction Will Complicate Antitrust Litigation 16

D. Claim Reduction Will Discourage Settlements 18

E. Claim Reduction Will Undermine Deterrence 19

PAGE

IV. If This Court Adopts a Rule of Claim Reduction, It Should Not Apply the Rule Retroactively So As to Undermine Past Settlements 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases:

In re Ampicillin Antitrust Litigation, 1979-2 Trade Cas. (CCH) ¶ 62,936 (D.D.C. 1979) 23

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 22

In re Corrugated Container Antitrust Litigation, 1979-1 Trade Cas. (CCH) ¶ 62,690 (S.D. Tex. 1979), *aff'd*, No. 79-2439 (5th Cir. October 30, 1979) (unreported), *cert. dismissed*, 49 U.S.L.W. 3288 (October 20, 1980) (No. 79-972) 13, 22, 23

The Duplan Corporation et al. v. *Deering Milliken Inc., et al.*, 444 F. Supp. 648 (D.S.C. 1977), *aff'd in part, rev'd in part*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) 2, 3

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 6

England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) 22

Flintkote Co. v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) 5n., 9

Glus v. *G. C. Murphy Co.*, 629 F.2d 248 (3rd Cir. 1980) 7

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) 22

PAGE

Hedges Enterprises v. *Continental Group, Inc.*, 1979-1 Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. 1979) 23

Hydrolevel Corp. v. *American Society of Mechanical Engineers, Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,651 (2d Cir. 1980) 5n., 9

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 10

Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) 19

Solomon v. *Houston Corrugated Box Co., Inc.*, 526 F.2d 389 (5th Cir. 1976) 10

Wainwright v. *Kraftco Corp.*, 58 F.R.D. 9 (N.D. Ga. 1973) 10

Washington v. *American Pipe & Construction Co.*, 280 F. Supp. 802 (S.D. Cal. 1968) 10

Wilson P. Abraham Const. Co. v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir.), *en banc hearing denied*, 608 F.2d 624 (1979), *petition for cert. granted sub nom., Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144, 49 U.S.L.W. 3321 (November 3, 1980) 20, 24

Statutes and Rules:

Clayton Act § 4, 15 U.S.C. § 15 .....3, 4, 6, 8, 9, 10

Commentary:

Sullivan, *New Perspectives In Antitrust Litigation Towards a Right of Comparative Contribution*, 1980-2 U. Illinois Law F. 389 14

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BRIEF OF AMICI CURIAE THE DUPLAN CORPORATION AND OTHERS IN SUPPORT OF RESPONDENTS

The Duplan Corporation and others[1] submit this Brief as amici curiae in support of Respondents Radcliff Materials, Inc. et al.[2] The amici join with Respondents in opposing contribution, but primarily address and oppose the position of Petitioner and other amici who advocate adoption of a rule of claim reduction in antitrust cases.

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[1] The Duplan Corporation, Burlington Industries, Inc., Leon-Ferenbach, Inc., Madison Throwing Co., National Spinning Company, Inc., Texfi Industries, Inc.

[2] Counsel for Petitioners and Respondents have consented to the filing of this amicus curiae brief. Counsels' letters so consenting are on file with the Clerk of the United States Supreme Court.

Interests of Amici Curiae

The amici (hereinafter referred to as the "Throwsters")[3] are yarn producers who produce yarn by texturing synthetic filaments on texturing machines. The Throwsters are antitrust plaintiffs in an eleven-year old patent-antitrust action pending in the United States District Court for the District of South Carolina entitled *The Duplan Corporation et al.* v. *Deering Milliken Inc., et al.,* Consol C/A No. 71-306.

In that action, the Throwsters established, after a nine-month trial on liability issues, that the defendants and other co-conspirators had entered into an unlawful agreement to stabilize and maintain royalties on false twist texturing machines (which the Throwsters require for their texturing operations) and had unlawfully monopolized the United States market for those machines. 444 F. Supp. 648, 681-83 (D.S.C. 1977).[4] The United States Court of Appeals for the Fourth Circuit affirmed the District Court in all but one minor respect in a *per curiam* opinion reported at 594 F.2d 979 (4th Cir. 1979), and this Court denied defendants' petitions for writs of certiorari at 444 U.S. 1015 (1980).

Several months prior to the trial on amount of damage in the *Duplan* action, the defendants moved to amend their answer to assert an affirmative defense of claim reduction. That motion was granted by the District Court on August 4, 1980. Defendants seek, through their claim reduction defense, to extinguish more than one half of the dollar amount of the Throwsters' claims, which defendants contend is attributable to a co-conspirator with whom the

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[3] Yarn producers are referred to as "Throwsters" in the texturing industry.

[4] During the litigation, every one of the 22 patents initially asserted against the Throwsters were held invalid, not infringed or both.

Throwsters settled more than six years ago in reliance on then unquestioned law.

The trial on damage issues in *Duplan* was held before the Hon. Franklin T. Dupree from November 17, 1980 to December 5, 1980. At the trial the defendants vigorously asserted their claim reduction defense. The parties have concluded their post-trial filings in the case and are awaiting a decision from the Court.

This Court's decision in this case may determine the fate of the claim reduction defense in the *Duplan* litigation. The Petitioner here and a number of amici curiae urge this Court to adopt both a rule of contribution and a rule of claim reduction. If this Court adopts a rule of claim reduction, the Throwsters will lose more than 50% of the dollar value of their treble damage claim against the *Duplan* defendants, and suffer the total frustration of expectations upon which their six-year old settlement with one of the co-conspirators was based. The result for the Throwsters will be the loss of a major portion of the treble damage recovery to which they are entitled under section 4 of the Clayton Act, 15 U.S.C. § 15; a recovery which they have sought during more than eleven years of arduous, complex patent-antitrust litigation. Significantly, this result is sought by the *Duplan* defendants and will occur despite the apparent availability of a contribution claim against the settling defendant, if a rule permitting contribution is adopted here.

In view of the revolutionary impact of this prospect, the significance of a rule of claim reduction, as pointedly illustrated by the *Duplan* case, and the fact that the case before this Court does not raise such an issue, the Throwsters join in the Brief of Respondents and respectfully submit this brief which focuses, almost exclusively, on the claim reduction question.

Summary of Argument

The Throwsters submit that claim reduction is a separate and distinct concept from contribution which is not raised here and which, if considered at all, should be considered by Congress. If claim reduction is to be addressed by this Court, it should be adjudicated in an appropriate case which squarely raises the issue and permits full briefing and argument of the subject.

The Throwsters further submit that if, nevertheless, the claim reduction issue is examined in this case, it should be rejected as a rule in antitrust cases. Claim reduction would deprive plaintiffs of their right under section 4 of the Clayton Act to recover three times the damages they sustain as a result of an antitrust violation and would undermine the doctrine of joint and several liability. Furthermore, claim reduction will not meaningfully remedy the unfairness perceived by some in the current rule against contribution and claim reduction in antitrust cases.

Adoption of a right of claim reduction will, however, complicate antitrust litigation enormously by imposing a new set of claim reduction issues on antitrust cases. It will also create a potentially impassable barrier to settlement by creating unacceptable uncertainty in the minds of plaintiffs concerning the impact which a settlement will have on their remaining claims against non-settling defendants.

Claim reduction will also result in a dramatic reduction in deterrence. It will reduce both the risk that a wrongdoer will be forced to pay treble damages for the injury he caused and the prospect that he will be forced to pay a disproportionate share of the damages caused by the violation.

Finally, if this Court rejects these arguments and adopts a rule of claim reduction in antitrust cases, the rule should

not be applied to pre-existing settlements because it will result in substantial hardship to plaintiffs who entered into those settlements in good faith reliance on previously unquestioned law.

ARGUMENT

I.

Claim Reduction Is Not An Issue Before the Court and Should Not Be Decided In This Case.

Claim reduction is not raised by the facts of this case. Claim reduction, the elimination of that portion of a plaintiff's claim attributable (on whatever basis) to a settling defendant in a multiple defendant case, only becomes relevant where one or more defendants have settled and the others proceed to trial.[5] Here there is no settlement and consequently there is no need on the facts of this case to consider the claim reduction question.

There is similarly no need to consider claim reduction on the law. Some amici argue that contribution and claim reduction are corollary notions or similar methods of liability allocation which must be considered together.[6] To the contrary, the notions of contribution and claim reduction are legally and conceptually distinct and contribution

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[5] Amici of course do not seek to maintain a rule which permits double recovery; the established rule, discussed *infra*, deducts the actual amount received in any prior settlement from a trebled judgment. *Hydrolevel Corp.* v. *American Society of Mechanical Engineers, Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,651 (2d Cir. 1980); *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

[6] *See*, Brief of Weyerhaesuer Company and Willamette Industries, Inc. at 2; Brief of Georgia Pacific Corporation and Packaging Corporation of America at 2, n. 2.

exists without the benefit of claim reduction in many areas of the law. More importantly, claim reduction in antitrust cases raises policy questions more vital and fundamental than those raised by contribution.

The fundamental differences between these two notions at once becomes apparent when they are compared. Contribution permits tortfeasors who have been found liable and have satisfied a judgment to allocate some of their liability among their other joint tortfeasors. *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, 260 n.8 (1979). Contribution involves nothing more than the allocation of established liability among defendants and in no way affects a plaintiff's recovery.

Claim reduction on the other hand, does not allocate established liability among joint tortfeasors. Rather, it extinguishes a portion of a plaintiff's claim when he settles with one defendant and continues to prosecute his case against the remaining defendants. Claim reduction, therefore, has little to do with allocating liability among joint tortfeasors. It is really a rule of settlements which, as demonstrated in Part II of this Brief, undermines section 4 of the Clayton Act, 15 U.S.C. § 15, and undermines the concept of joint and several liability.

This basic difference between a right of contribution and a right of claim reduction was recognized by this Court in *Edmonds* v. *Compagnie Generale Transatlantique, supra.* There, in commenting on the right of contribution in admiralty cases, this Court emphasized that such a right could not be used to deprive a plaintiff of a full recovery for his injury. The Court wrote:

> [T]he general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in

> causing the injury. Normally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor . . . . Contribution remedies the unjust enrichment of the concurrent tortfeasor, see Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 136 (1932), and while it may sometimes limit the ultimate loss of the tortfeasor chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched. Our prior cases recognize that. Even before *Reliable Transfer,* we apportioned damages between vessels that collided and sued one another. *Reliable Transfer* merely changed the apportionment from equal division to division on the basis of relative fault. ***But we did not upset the rule that the plaintiff may recover from one of the colliding vessels the damage concurrently caused by the negligence of both.***

Id. at 271-2 n.30. (citations omitted) (emphasis supplied).

Similarly, the Third Circuit Court of Appeals in *Glus* v. *G. C. Murphy Co.,* 629 F.2d 248, 257-58 (3rd Cir. 1980), while recognizing a right to contribution in Title VII cases, refused to grant a non-settling defendant's request to reduce the plaintiff's recovery by one-half to reflect a nominal settlement with the other defendant. Claim reduction therefore is not an integral part of or corollary to contribution, either conceptually or legally.

Due to the differences between contribution and claim reduction, claim reduction raises a host of issues which are not raised by contribution and which have not been briefed by Petitioner or the amici urging adoption of such a right. Those issues, which are discussed below, raise fundamental questions of antitrust law and policy which require the most careful and painstaking consideration. The Throw-

sters respectfully submit that these are questions which the Congress should address rather than the courts. If this Court believes that claim reduction is a question appropriate for judicial resolution, the Throwsters urge that it address that question in a case which squarely raises the issue and in which the parties have an opportunity to fully brief the implications of that separate and distinct concept. The Throwsters address these implications in the following section of this Brief.

II.

Claim Reduction Overturns Long Established Rules of Antitrust Law.

A. *Claim Reduction Is Prohibited by Section 4 of the Clayton Act and, If Adopted, Would Effectively Amend It.*

The basic statutory command of the antitrust laws on which all treble damage actions are based is section 4 of the Clayton Act, 15 U.S.C. § 15. Section 4 provides in pertinent part that:

> Any person who shall be injured in his business or property by reason of any thing forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Claim reduction offends the command of section 4 by depriving a plaintiff of the recovery to which he is statutorily entitled: three times the actual damage he suffered as a result of the antitrust violation. This occurs because, under a rule of claim reduction, a portion of a plaintiff's claim is extinguished if he settles with any defendant. Thus,

under such a rule, a settlement with any defendant would preclude the plaintiff from exercising its right to satisfy fully the balance of his claim against the other joint defendants. *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 398 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957); *Hydrolevel Corp.* v. *American Society of Mechanical Engineers, Inc.,* 1980-81 Trade Cas. (CCH) ¶ 63,651 (2d Cir. 1980).

This is demonstrated by a simple example. Assume that a plaintiff is damaged in the amount of $50,000 as a result of an illegal price fixing conspiracy among three conspirators. Under section 4, the plaintiff is statutorily entitled to a treble damage judgment in the amount of $150,000. If the plaintiff settles with one of the defendants prior to trial for $10,000, his rights under section 4 are preserved because he may continue to prosecute his action against the remaining defendants for the full amount of his injury. If the plaintiff succeeds in establishing that he was injured in the amount of $50,000, that amount will be trebled and, under existing law, the $10,000 settlement amount will then be deducted. *Flintkote Co.* v. *Lysfjord, supra; Hydrolevel Corp.* v. *American Society of Mechanical Engineers, Inc., supra.* Thus, the plaintiff will recover the $150,000 to which he is entitled under section 4: $140,000 from the non-settling defendants and $10,000 from the settling defendant.

Claim reduction, however, ignores the plaintiffs' rights under section 4 by arbitrarily reducing the claim against the remaining defendants in a manner which may be unforeseeable at the time of the settlement. If the per capita method of claim reduction proposed by Petitioner is ultimately adopted, the plaintiff in the above example would lose one-third of his claim as a result of his $10,000 settlement. Thus, under this form of claim reduction, his maximum recovery would be $110,000 despite the fact that

he is entitled under section 4 to recover $150,000. Alternatively, his recovery might be measured (and reduced) by an assessment of relative culpability of the defendants, or their respective participation in transactions in suit, or on some other basis. This result is plainly prohibited under section 4 and, if sanctioned, would implicitly amend the statute.

B. *Claim Reduction Undermines the Concept of Joint and Several Liability.*

It is established that liability in antitrust treble damage actions is joint and several. *Solomon* v. *Houston Corrugated Box Co., Inc.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976); *Washington* v. *American Pipe & Construction Co.*, 280 F. Supp. 802, 804 (S.D. Cal. 1968); *Wainwright* v. *Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. Ga. 1973). The joint and several nature of antitrust liability was explained by Mr. Justice White in his concurring opinion in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). There, Mr. Justice White wrote:

> [A] third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the reach of § 1 of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages, sufficient to permit a third party to recover.

392 U.S. at 144.

Adoption of a rule of claim reduction is inconsistent with the principle of joint and several liability, in that such a rule must rest upon a premise that any individual defendant is responsible for only a portion of the total damage inflicted by the combination. The full implications of such a premise threaten sweeping complications in already complex antitrust litigation.

In a world of contribution and claim reduction, a plaintiff may lose his right to satisfy an antitrust judgment against any or all of the antitrust defendants, as each defendant asserts his contribution and claim reduction rights in an effort to minimize his payment to the plaintiff. Defendants would support this position by claiming that since rights of contribution and claim reduction limit a defendant's liability to a share of the plaintiff's total damage, the court must determine each defendant's liability share, with plaintiff to be limited to collecting that share from each defendant.

The result will be extraordinary complication of treble damage suits. Pretrial and trial will be complicated by consideration of relative fault, relative size, market share and extent of participation by defendants in individual transactions as the court and litigants struggle to apply the appropriate method of claim reduction. Post judgment proceedings will be complicated by questions as to the impact on the allocation of liability of insolvencies, jurisdictional problems and difficulties in levying execution upon assets of the various defendants. This will add yet another level of delay to antitrust proceedings and will frustrate the efforts of plaintiffs to vindicate their rights under section 4 of the Clayton Act. Even where no settlement has occurred, difficulties in enforcing a judgment may deprive a plaintiff of his full statutory recovery.

III.

Considerations of Antitrust Policy Do Not Support Adoption of a Rule of Claim Reduction.

The parties before the Court and certain other amici have presented a number of policy considerations which they believe should be examined in deciding the issue before the Court. The Throwsters do not wish to add to the arguments concerning those issues as they relate to contribution. It is important, however, to review those issues as they relate to claim reduction. The Throwsters submit that these considerations demonstrate that claim reduction is a question which only Congress can meaningfully address and that, after consideration, it should be rejected.

A. *The Coercive Effect of Large Multi-Defendant Antitrust Actions Does Not Require Adoption of a Rule of Claim Reduction.*

A number of the amici argue that rights of contribution and claim reduction are needed to redress an imbalance in the relative negotiating strengths of plaintiffs and defendants in large antitrust treble damage actions. The amici argue that the combination of the treble damage remedy and joint and several liability combine to create enormous exposure which coerces defendants into extortionate settlements.[7]

The Throwsters submit that the concern expressed by some of the amici about coercion is overstated. In any lawsuit where there are multiple defendants, a clever plaintiff can endeavor to divide the defendants and cause them to bid against each other in an attempt to gain a favorable

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[7] *See* Brief of Westvaco Corporation at 9-11; Brief of The Mead Corporation at 8-15; Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 4-9.

settlement. This is not unique to antitrust litigation. It can occur in any case involving multiple defendants.

Defendants in such cases, however, are not without impressive resources of their own. If defendants fear the kind of coercive settlement tactics which some of the amici claim to have experienced, they can enter into a sharing agreement so that no one defendant is forced to assume the risk of paying the damage judgment for all the defendants. Such an agreement certainly removes the element of fear which the amici claim led to the "settlement stampede" in the *Corrugated Container Antitrust Litigation.* Alternatively, defendants can agree to insist on a global settlement and thereby frustrate a plaintiff who seeks to pursue a "divide and conquer" strategy.

Defendants can also insist, as part of any settlement into which they enter, that the plaintiff reduce his claim against the remaining defendants or agree to hold them harmless from any contribution claims asserted against them by non-settling defendants. Significantly, in *Corrugated* one settling defendant, Westvaco, apparently succeeded in obtaining just such a claim reduction provision.[8] For a defendant in *Corrugated,* which has been presented to this Court as the archetypal example of a coercive settlement case, to obtain a consensual claim reduction agreement as part of its settlement, casts significant doubt on on the severity of the coercion problem. In any event, if, as a number of amici indicate, claim reduction can be and is voluntarily negotiated between plaintiffs and defendants in antitrust cases, there is no need to change the law to make claim reduction mandatory.[9] Coercion is therefore not

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[8] *See* Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 20-21.

[9] *See* Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 21 n.24; Brief of CPC International Inc. at 7.

a sufficient justification for creating a right of claim reduction.

B. *Claim Reduction Is Unfair.*

A significant argument made in support of contribution and claim reduction is that it eliminates unfairness in antitrust cases by apportioning liability among antitrust violators.[10] The Throwsters respectfully submit that a rule of claim reduction, whether adopted as part of a right of contribution or not, will not effectively remedy this perceived unfairness.

If a rule of claim reduction is to be adopted, consideration must be given to the method of claim reduction to be used. The Petitioner here proposes use of a per capita method of allocating liability.[11] Olson Farms Inc. in its brief proposes to base claim reduction on the settling defendant's market share.[12] Still other proposals for claim reduction call for use of a relative fault standard. Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution,* 1980-2 U. Illinois Law F. 389, 422. If a rule of claim reduction is adopted which incorporates only one of these standards, unfair and prejudicial results in some cases are inevitable. Examples of the type of inequity which can result under each of these methods are briefly outlined below.

1. *Per Capita Claim Reduction*—Under a method of per capita claim reduction, the damages resulting from the violation are divided by the number of conspirators. Each conspirator bears an equal share of the liability regardless

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[10] *See* Brief of Petitioner at 11-15.

[11] *Id.* at 27.

[12] Brief of Olson Farms Inc. at 18.

of its degree of fault, the financial benefit derived from the violation or its ability to pay.

Under this form of claim reduction, if the largest and most culpable defendant settles early, the claim against the remaining defendants will be reduced only by the settling defendant's per capita share of the liability. For a small defendant who was a latecomer to the conspiracy and profited little from it, this is fundamentally inequitable.

2. *Market Share Claim Reduction*—The alternative measure of basing claim reduction on the relative market shares of the defendants is similarly fraught with inequity. Under this approach, claims against non-settling defendants will be reduced by a percentage equal to the settling defendant's percentage of the market.

While at first blush this approach might seem to be basically fair, it is easy to imagine situations where it is grossly unjust. One such situation is the case where a small company with a relatively large market share was involved on the fringes of a price fixing conspiracy which was led by a large, diversified company which had a relatively small share of the market. If the large, guilty company settles with the plaintiff early in the case—as it should according to the amici—the claim against the remaining defendants will be reduced only by a small percentage equal to the settling defendant's small market share. For the small company with the large market share, such a reduction in its potential exposure has little meaning. It will still be faced with paying a significant portion of the ultimate damage award despite the fact that it was on the fringes of the conspiracy and is not as able as the settling defendant to satisfy such a judgment. For this non-settling defendant, market share claim reduction is grossly inequitable.

3. *Relative Fault Claim Reduction*—From the standpoint of fairness, perhaps the most attractive method of claim reduction is based on the relative fault of the parties. Unfortunately, this method of claim reduction does not address the concerns voiced by contribution and claim reduction proponents. Under this form of claim reduction, a settling defendant's degree of fault is assessed and that portion of total liability is eliminated from the claim facing the non-settling defendants.

The determination of the settling defendant's liability, however, cannot be made until trial. As a result, non-settling defendants remain uncertain over the potential liability which they continue to face and the pressure generated by this uncertainty may generate the same type of settlement coercion to which the amici now object. In addition, they face the same problems of unfairness which result if ability to pay and market significance are not considered. Relative fault will not, therefore, resolve the problem of unfairness.

As these examples demonstrate, claim reduction is not a panacea for the problem of unfairness. Even if combined with a right of contribution, the problems of unfairness persist. Accordingly, adoption of a right to claim reduction in antitrust cases cannot be justified by considerations of fairness.

C. *Claim Reduction Will Complicate Antitrust Litigation.*

A major concern of proponents of contribution is that contribution will complicate litigation and chill settlements if non-settling defendants are allowed to assert contribution claims against settling defendants.[13] Claim reduction

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[13] Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 12.

is considered by some to be a solution to this problem because it releases the settling defendant from the litigation. While this may conceivably occur, the Throwsters are convinced that claim reduction will further complicate antitrust litigation and will impose a whole series of new issues on antitrust trials which will make them increasingly difficult to try for both judges and lawyers.

Claim reduction will complicate antitrust litigation by forcing the plaintiff and non-settling defendants to determine at trial how much the claim should be reduced as a result of one or more settlements. In making this inquiry, a threshold determination must be made as to whether the settling defendant in fact violated the antitrust laws. If the settlors are found to be innocent, logic dictates that the claim against the non-settling defendants not be reduced. The problem posed by this inquiry is that it requires that the settling defendant be tried almost as if he were still in the case.

If any claim reduction method other than per capita is used, additional evidence concerning the settling defendant will need to be adduced to establish the basis for reducing the plaintiff's claim to take account of the settlement. If claim reduction is based on market share, this will require evidence of the settlor's market share or sales. If claim reduction is based on relative fault, the settling defendant's conduct will have to be examined to establish his degree of fault. This will effectively require trying the settling defendant as if he had never settled.

The addition of this new issue of proof in treble damage actions will further complicate already complex and cumbersome antitrust litigation. Claim reduction therefore will certainly not be a mechanism which simplifies litigation and it cannot be justified on those grounds.

D. *Claim Reduction Will Discourage Settlements.*

Ironically, claim reduction, which Petitioner and certain amici view as a solution to the settlement obstacles created by contribution,[14] is itself a potentially impassable obstacle to settlements, and reduces the prospect of any settlement to the likelihood of settling with the most recalcitrant defendant. As demonstrated in part IIB of this Brief, different methods of applying claim reduction involve result in serious inequities in certain situations. In order to avoid the inequities caused by the use of a single method of claim reduction, it is rational to apply a method of claim reduction which is most equitable under the circumstances presented in a given case. The fatal vice of such an approach, however, is that it creates such uncertainty as to the actual impact of a settlement on the plaintiff's remaining claim, that he will not settle without negotiating with all defendants.

A short example makes this clear. If a plaintiff wishes to settle with a large defendant who has a relatively large market share, but is one of many corporate defendants, it will be vital to the plaintiff in evaluating the settlement to know which method of claim reduction the court may ultimately use. If the court were to use per capita claim reduction, the settlement might be quite attractive. If, on the other hand, the court were to use a market share or relative fault method, the settlement might be unacceptable.

Conceivably, the plaintiff could seek the court's guidance on the matter, but it is unlikely that the court will be in a position to make a definitive ruling on the matter before trial. If the choice of claim reduction method is to be based

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[14] See Petitioner's Brief at 26-27, Brief of Weyerhaeuser Company and Willamette Industries, Inc. at 12-14; Brief of Georgia Pacific Corporation and Packaging Corporation of America at 25-26.

on basic fairness, the court will almost certainly be unable to make that determination until it is able to weigh the equities at trial. Once the decision on method of claim reduction is made, the court may still have to wait until the end of trial to develop the necessary information to apply the chosen claim reduction method.

The uncertainty created by the court's choice of a method of claim reduction will be intolerable to many plaintiffs. It will put them in the position of having a claim whose value fluctuates wildly with the choice of the claim reduction method. Moreover, this uncertainty will be compounded by each additional settlement into which the plaintiff enters. The result of this enormous uncertainty may well be that many plaintiffs will insist on global settlements or refuse to settle at all.[15] This serious disincentive to settlement is a strong policy reason for rejecting a right of claim reduction.

E. *Claim Reduction Will Undermine Deterrence.*

One of the major controversies surrounding the question of contribution is the impact which such a right will have on the deterrent effect of the antitrust treble damage action. Proponents of contribution contend that contribution will deter antitrust violations by increasing the probability that violators will be forced to satisfy a portion of a treble damage judgment. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979). Contribution opponents, on the other hand, assert that

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[15] The uncertainty created by claim reduction may cripple partial settlements in class actions. If a class representative and his attorney can only guess about the result which a settlement may have on the balance of their claim, it is not at all clear how they can recommend such a settlement to the court as being in the best interests of the class. Nor is it clear how a court could approve such a settlement.

deterrence is maximized by threatening antitrust violators with a disproportionately large treble damage award. *Wilson P. Abraham Const. Co.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir.), *en banc hearing denied*, 608 F.2d 524 (1979), *petition for cert. granted sub nom., Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144, 49 U.S.L.W. 3321 (Nov. 3, 1980).

Claim reduction, unlike contribution, does not give rise to a dispute over its impact on deterrence. A right of claim reduction will, without question, reduce deterrence. The rationale for this conclusion is straightforward. Like contribution, claim reduction reduces the likelihood that one defendant will be forced to satisfy a disproportionately large judgment which includes damages attributable to his joint tortfeasors. This characteristic of claim reduction unambiguously leads to a reduction in deterrence.

Unlike contribution, however, claim reduction does not insure that all the wrongdoers pay for their violation of the antitrust laws. Under claim reduction, a defendant can settle cheaply with the plaintiff and never be called to account for his wrongdoing. Thus, under claim reduction, the deterrent enhancing impact of contribution—increased probability that all wrongdoers pay treble damages—is lost, while the risk that some defendants will face disproportionate treble damage awards is lost as well. The result is an unambiguous loss of deterrence.

Claim reduction also reduces deterrence by reducing the incentive of plaintiffs to sue. Potential antitrust violators know that under existing law the prospect of a full treble damage recovery increases the likelihood that their transgressions will result in litigation. Claim reduction creates a disincentive for plaintiffs to bring such litigaton by presenting them with a further risk of a small recovery, which

must be added to the enormous existing risks of litigating complex cases against well-funded antitrust violators. By rendering the prospect of litigation less certain, claim reduction reduces deterrence.[16]

The arguments reviewed in this section of this Brief establish, if nothing else, that the number and complexity of the policy considerations relevant to the assessment of a right of claim reduction make this issue one for Congress to decide. The very concept of treble damages is heavily freighted with Congressional purpose. Consideration of a rule which will produce a recovery of less than full treble damages should not, the Throwsters submit, be adopted by a judicial uprooting of long-established principles.

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[16] Although claim reduction reduces the likelihood that any particular litigation will be brought, it is likely to increase rather than reduce the overall number of antitrust actions brought. This result flows from the prospect of an increased number of violations in light of the weakening of deterrence. As violations increase, the number of actions will inevitably increase, even though a smaller percentage of the total number of violations will give rise to suits.

IV.

If This Court Adopts a Rule of Claim Reduction, It Should Not Apply the Rule Retroactively So As to Undermine Past Settlements.

If this Court adopts a rule of claim reduction, the Throwsters respectfully request that it not be applied retroactively to settlements entered into prior to this Court's decision.

It is well established that new rules of law, whether set forth by statute or judicial decision, are to be given prospective-only application where their retrospective application would result in serious prejudice or hardship. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). Application of a rule of claim reduction to the Throwsters' six year old settlements—which were made in reliance on then unquestioned law and in which the Throwsters expressly reserved their claims against the non-settling defendants—would seriously prejudice the Throwsters, undermine years of investment and effort in seeking to recover for the antitrust injuries they suffered and give the defendants in the *Duplan* litigation, adjudicated antitrust violators, a windfall which they never expected and to which they are not entitled.

This conclusion is confirmed by the fact that those courts which have been faced with either the contribution or claim reduction question in antitrust cases have uniformly refused to permit such claims where to do so would tend to undermine previously existing settlements. *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,690 (S.D. Tex. 1979), *aff'd*, No. 79-2439 (5th

Cir. October 30, 1979) (unreported), *cert. dismissed*, 49 U.S.L.W. 3288 (October 20, 1980) (No. 79-972) (where the court also refused to recognize a claim reduction defense); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 1979-2 Trade Cas. (CCH) ¶ 62,936 (D.D.C. 1979). The rationale of the court in *Corrugated Container* is particularly cogent and directly applicable in this regard:

> If, however, the rule [against contribution] were eventually to be otherwise in this circuit, there is a compelling reason not to grant the motions of Westvaco and the three other defendants in this case, at this time. Such a rule should not be applied retroactively where the settling litigants have relied on unvarying past precedent in reaching agreements with the plaintiffs' class. . . . It would be inequitable to apply such a rule retroactively to this case.

1979 Trade Cas. (CCH) ¶ 62,690 at 77,880.

The Throwsters respectfully submit that if this Court adopts a rule of claim reduction for antitrust cases it specify that such a rule not apply to pre-existing settlements.

CONCLUSION

For the foregoing reasons, the Throwsters respectfully submit that this Court affirm the decision of the United States Court of Appeals for the Fifth Circuit in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.* The Throwsters also respectfully request that this Court not address the question of claim reduction in this case or, if the Court does address that question, that it reject claim reduction. If the Court should decide to adopt such a rule, the Throwsters request that it be held inapplicable to to pre-existing settlements.

Respectfully submitted,

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